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No. 07-734

IN THE

Supreme Court of the United States

ILLINOIS BELL TELEPHONE CO.,
Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 21,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICUS CURIAE* UNITED STATES TELECOM ASSOCIATION SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a "recognition clause," a boilerplate provision found in virtually every collective bargaining agreement that simply affirms the union's status as representative of bargaining unit employees, requires an employer to arbitrate disputes not otherwise implicating any term or provision of the agreement.

TABLE OF CONTENTS

	Page
Question Presented	i
Interest Of *Amicus Curiae*	1
Introduction And Summary	3
Reasons For Granting The Petition	8
I. The Court Of Appeals' Decision Has Far-Reaching And Dramatic Consequences	9
A. The Clauses Interpreted Below Are Commonplace In Collective Bargaining Agreements	9
B. The Decision Below Upsets Settled Presumptions Regarding Workplace Changes Not Addressed By Collective Bargaining	11
II. The Decision Below Cannot Be Reconciled With This Court's Decisions Or Fundamental Principles Of Contract Interpretation	14
A. The Seventh Circuit's Decision Conflicts With *NLRB* v. *Borg-Warner Corp.*, 356 U.S. 342 (1958)	14
B. The Court Of Appeals' Decision Disregards The Ordinary Canons Of Construction	16
Conclusion	23

TABLE OF AUTHORITIES

Page

CASES

Aluminum Co. of Am. v. *UAW*, 630 F.2d 1340 (9th Cir. 1980) 6, 12, 18, 19, 20, 21

Beach Commc'ns, Inc. v. *FCC*, 959 F.2d 975 (D.C. Cir. 1992) 22

Boeing Co. v. *UAW*, 349 F.2d 412 (3d Cir. 1965) 13

Conn. Nat'l Bank v. *Germain*, 503 U.S. 249 (1992) 8

Green v. *Biddle*, 21 U.S. (8 Wheat.) 1 (1823) 8

Heckler v. *Ringer*, 466 U.S. 602 (1984) 21

Inland Tugs v. *NLRB*, 918 F.2d 1299 (7th Cir. 1990) 11

Local Lodge No. 1424, Int'l Ass'n of Machinists v. *NLRB*, 362 U.S. 411 (1960) 15

Lujan v. *Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990) 21

Milwaukee Spring Div. of Ill. Coil Spring Co., 268 N.L.R.B. 601 (1984), *aff'd*, 765 F.2d 175 (D.C. Cir. 1985) 10

NLRB v. *Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958) 5, 14, 15

Norfolk S. Ry. Co. v. *Kirby*, 543 U.S. 14 (2004) 8, 17

Shalala v. *Ill. Council on Long Term Care, Inc.*, 529 U.S. 1 (2000) 21, 22

TABLE OF AUTHORITIES—Continued

Page

Thunder Basin Coal Co. v. *Reich*, 510 U.S. 200 (1994) 21

UAW v. *Acme Precision Prods., Inc.*, 521 F. Supp. 1358 (E.D. Mich. 1981) 18

UAW v. *NLRB*, 765 F.2d 175 (D.C. Cir. 1985) 11

United Gas Pipe Line Co. v. *Memphis Light, Gas & Water Div.*, 358 U.S. 103 (1958) 17

United Steelworkers of Am. v. *Am. Mfg. Co.*, 363 U.S. 564 (1960) 10

STATUTE

29 U.S.C. § 158(a)(5) 15

MISCELLANEOUS

11 *Williston on Contracts* (4th ed. 1999) 17

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BRIEF OF AMICUS CURIAE UNITED STATES TELECOM ASSOCIATION SUPPORTING PETITIONER

INTEREST OF *AMICUS CURIAE*

The United States Telecom Association ("USTelecom") is the premier trade association representing service providers and suppliers for the telecom industry. USTelecom represents companies offering a wide range of services across communications platforms, including voice, video and data over local exchange, long distance, wireless, Internet, and cable services. USTelecom's members include many of the smallest providers in the industry as well as many of the largest. Those companies collectively represent hundreds of billions of dollars in

investment; have annual revenues in the tens of billions of dollars; and employ millions of workers.[1]

This case concerns the effect of the standard "recognition clause"—a provision found in virtually every collective bargaining agreement—on the right to demand arbitration. The collective bargaining agreement in this case, like many others, limits arbitration to certain instances of employee discipline and matters that "involve" the "interpretation or application of any terms or provisions of" the collective bargaining agreement. There is no dispute that the collective bargaining agreement here does not address the performance standards the union sought to arbitrate. In the decision below, the court of appeals nonetheless held that the issue was subject to arbitration because an arbitrator *could* construe the recognition clause—which recognizes the union as the representative of the relevant bargaining unit—to prohibit *any* "significant changes in the terms and conditions of employment without the consent of the Union." Pet. App. 6a. Because USTelecom's members employ hundreds of thousands of unionized workers, USTelecom has a strong interest in and unique insight into the question presented in this case. Many USTelecom members, covering urban and rural areas throughout the Nation, have con-

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[1] Pursuant to this Court's Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amicus* and its counsel made such a monetary contribution. Pursuant to this Court's Rule 37.2, counsel of record for both petitioner and respondent were notified of *amicus*'s intent to file this brief at least 10 days before the brief's due date. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

tracts with clauses similar to the ones at issue here, and have substantial experience with their meaning and practical effect.

INTRODUCTION AND SUMMARY

I. The impact of the Seventh Circuit's divided decision is difficult to overstate. Myriad collective bargaining agreements throughout the country include arbitration provisions that are functionally indistinguishable from the ones at issue here. Such agreements regularly provide that arbitration is available for matters that involve the "interpretation or application of any of the terms or provisions of" the collective bargaining agreement. Pet. 3. And they universally include a "recognition clause" that identifies the union as the representative of an identified "bargaining unit" of employees.

In this case, there can be no dispute that the collective bargaining agreement does not address the matter for which arbitration is sought—a new performance policy for the sales staff. Pet. App. 3a. For that reason, it is impossible to say that the matter "involve[s]" the "interpretation or application of any of the terms or provisions of" the collective bargaining agreement within the meaning of the arbitration provision. The majority opinion nonetheless held that a dispute over the new performance standards must be arbitrated because it involves the application or interpretation of the "recognition clause." Although that clause merely states that the union is the bargaining representative of certain employees, the panel majority held that an arbitrator *could* construe it to bar petitioner from making any "significant changes * * * without the consent of the Union." Pet. App. 6a. As the dissenting opinion observed, such a "boundless" interpretation of the recognition clause cre-

ates a potentially limitless duty to arbitrate—one that extends to every change an arbitrator (or the union) might deem "significant." Pet. App. 17a-18a.

The Seventh Circuit's holding is noteworthy in its own right. It cannot be reconciled with the terms of the agreement; it cannot be reconciled with this Court's cases; and it utterly defeats the structure and underlying purpose of the agreement's carefully crafted arbitration clause. Indeed, it rewrites the arbitration provision from one that encompasses *only* employee discipline and "matters which involve interpretation or application of any of the terms or provisions of th[e] Agreement," into one that encompasses employee discipline, matters which involve interpretation of the agreement, *and any other "significant" change.*

But the Seventh Circuit's holding is of inordinate and immediate importance because the clauses it construes are standard provisions in countless collective bargaining agreements. *Amicus*'s members (large and small, urban and rural) have agreements with functionally indistinguishable terms. One large member, with more than 75,000 employees, has more than *50* contracts (virtually all of its agreements) with similar clauses. And, during one recent period, that member rejected, under just one of those contracts, more than 150 grievances that, like the demand at issue here, purported to require construction of the recognition clause. Even aside from the flood of arbitrations the majority opinion portends, that decision upsets the traditional rights of employers under collective bargaining agreements. Before the decision below, the general rule was that employers could unilaterally implement a new policy if it is not addressed in the collective bargaining agreement (following an impasse if bargaining is mandatory). Now, by contrast,

employers must arbitrate every significant policy change even where the collective bargaining agreement says nothing about the issue. The decision below thus drops the judicial equivalent of napalm not merely on the plain meaning of standard provisions in collective bargaining agreements, but also on the established understandings that previously pervaded the industry.

II. The decision below, moreover, conflicts with this Court's precedents, disregards standard principles of construction, and does violence to the careful (and common) structure of the collective bargaining agreement.

A. In *NLRB* v. *Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958), this Court explained that a recognition clause does *not* concern "wages, hours, and other *terms and conditions of employment.*" *Id.* at 349 (emphasis added). In this case, the panel majority reached precisely the opposite result, holding that an arbitrator could construe a recognition clause "to prohibit * * * significant changes *in the terms and conditions of employment* without the consent of the Union." Pet. App. 6a (emphasis added). Given that recognition clauses are found in virtually every collective bargaining agreement, that conflict has enormous consequences.

B. The Seventh Circuit's decision, moreover, defies plain text, inverts ordinary principles of construction, and makes hash of the collective bargaining agreement's careful structure. There is simply no way a standard recognition clause can be read not merely to recognize the union as the bargaining representative of specified employees but also to impose, by itself, the substantive requirement that management obtain union consent for all "significant" workplace changes.

The court of appeals apparently thought a general policy of "striv[ing] to avoid absurd results," Pet. App. 5a, made it appropriate to stretch the otherwise unambiguous language of the recognition clause. The court of appeals asserted that, given the existence of a no-strike clause in the collective bargaining agreement, denying arbitration would "leave the union without options." Pet. App. 8a. The assertion that the union would lack any recourse is simply incorrect. See pp. 7, 19-23, *infra*. More fundamentally, if the agreement does not itself provide a right to strike or otherwise demand arbitration with respect to the changes at issue, that is because the union did not successfully bargain for such a right (perhaps giving it up for other rights thought more valuable). To nonetheless read the agreement to provide for arbitration or other redress not set forth in the agreement does not construe the agreement; it rewrites it. As another court of appeals has explained, "a party may not always seek to have resolved through arbitration those matters which it was not successful in resolving through bargaining." *Aluminum Co. of Am.* v. *UAW*, 630 F.2d 1340, 1344 (9th Cir. 1980) (Kennedy, J.).

The Seventh Circuit's effort to provide for arbitration of any "significant" change—even terms and conditions not otherwise addressed in the agreement—destroys the structure, coherence, and purpose of the arbitration provision. The agreement provides *two* categories of matters subject to arbitration—(a) matters involving construction or interpretation of the collective bargaining agreement, *and* (b) the *discipline* of any non-probationary employee. That second clause allows the union to seek arbitration if any of its members is disciplined under the new performance policies. In that process, the union can challenge the validity of the discipline by challenging

the underlying policy as well. The Seventh Circuit panel was thus incorrect that, absent arbitration now, the union would lack a remedy. Even apart from the union's ability to seek different rules in the next collective bargaining session and other potential remedies, the new performance policy can be arbitrated *if and when* any non-probationary employee is subject to discipline under the new policy. See *Alcoa*, 630 F.2d at 1344 & n.7 (agreement "leave[s] resolution of these issues to the collective bargaining process, negotiation," and other means of resolution, while foreclosing arbitration "at least until the policy is applied in particular cases").

That structure is both common to collective bargaining agreements and entirely sensible. Federal statutes, for example, often proscribe abstract judicial challenges to new agency rules or policies, instead requiring such challenges to be raised in the context of a concrete agency decision applying the policy to the detriment of a particular individual. That approach ensures that any adjudication takes place in a concrete, factual context that will help promote a better understanding of the rule and its consequences. It promotes economy, preventing adjudication of disputes over policies that may never be applied. And it gives the agency the opportunity to avoid the controversy by refining its views once it sees the consequences of its policy in operation. Those same benefits are secured where, as here, the collective bargaining agreement bars abstract arbitration of matters not covered by the collective bargaining agreement, and instead defers such arbitration until the policy at issue is applied to an individual and results in concrete and actual discipline. The decision below eviscerates that carefully crafted structure.

REASONS FOR GRANTING THE PETITION

In case after case, this Court has admonished the federal courts to presume that text—whether in a statute or in a contract governed by federal law—means "what it says" and "says * * * what it means." *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-54 (1992); *Norfolk S. Ry. Co.* v. *Kirby*, 543 U.S. 14, 32 (2004) ("[W]here the words of a law, treaty, or contract, have a plain and obvious meaning, all construction, in hostility with such meaning, is excluded.") quoting *Green* v. *Biddle*, 21 U.S. (8 Wheat.) 1 (1823))). Departing from that principle, the panel majority in this case construed two provisions of a collective bargaining agreement to create a new and virtually unbounded right to arbitrate any "significant" change in working conditions despite the absence of any contract provision so stating. The utter impossibility of reconciling the majority's construction with the plain terms and structure of the collective bargaining agreement (as well as this Court's decisions) itself suggests the need for review by this Court.

But the far-reaching and destabilizing impact of the panel decision on countless collective bargaining agreements makes immediate review imperative. The provisions the Seventh Circuit invoked to manufacture a right to arbitrate in this case—a right that extends to virtually any "significant" policy change—are commonplace in collective bargaining agreements. A more breathtaking expansion of arbitration rights is thus difficult to imagine. That expansion is particularly problematic because it reverses the presumption that, until now, had prevailed. Before the decision in this case, the settled rule was that, absent a contrary agreement, an employer is entitled unilaterally to implement a proposal with respect to matters not addressed in the collective bar-

gaining agreement. Relying on a "recognition clause" that is standard in collective bargaining agreements, the decision below effectively inverts that presumption, imposing inordinate delays and costs in the process.

I. The Court Of Appeals' Decision Has Far-Reaching And Dramatic Consequences

A. The Clauses Interpreted Below Are Commonplace in Collective Bargaining Agreements

The majority's decision to compel arbitration in this case rested on two collective bargaining provisions that are commonplace. The first is the "recognition clause," which recognizes the union as the representative of the identified group or "bargaining unit" of employees. The second is an arbitration provision, which specifies those matters that are subject to arbitration. "The right to invoke arbitration," that provision declares, "shall extend only to matters which involve" either (a) the "interpretation or application of any of the terms or provisions of this Agreement * * * ," or (b) the "discipline of an employee with" more than six months of service. Pet. 3.

There was (and can be) no dispute that the particular "matter" at issue in this case—new performance standards for the sales force—is not addressed by any term or provision of the collective bargaining agreement. As the majority conceded, "nothing in the CBA specifically pertains to the implementation of performance guidelines." Pet. App. 3a. For that reason, it is implausible to suggest that the matter "involve[s]" the "interpretation or application of any of the terms or provisions of" the collective bargaining agreement. Nor was there "discipline" of any employee under the policy within the meaning of the agreement.

The panel majority nonetheless held that the union had a right to arbitration on the theory that the dispute might involve interpretation of the "recognition clause." Although the boilerplate recognition clause merely states that the union is the bargaining representative of certain employees, the panel held that an arbitrator *could* construe it to bar the company from making any "significant changes * * * without the consent of the Union." Pet. App. 6a. Even setting aside the panel's failure to offer any reasoned analysis that could conceivably convert a union recognition clause into a union "veto" clause requiring union consent for all significant changes, Pet. App. 15a (Sykes, J., dissenting), that ruling creates a potentially "limitless" duty to arbitrate—one that extends to every change an arbitrator (or the union) might deem "significant," *id.* at 17a-18a (Sykes, J., dissenting).

More important for present purposes, that virtually unbounded obligation would become part of countless collective bargaining agreements. As petitioner correctly observes, nearly "every American labor agreement" contains a standard recognition clause like the one the court of appeals relied on here. *Milwaukee Spring Div. of Ill. Coil Spring Co.*, 268 N.L.R.B. 601, 602 (1984), *aff'd*, 765 F.2d 175 (D.C. Cir. 1985). Likewise, "the standard form" arbitration provision in countless collective bargaining agreements calls for arbitration of "all disputes between the parties 'as to the meaning, interpretation and application of the provisions of this agreement.'" *United Steelworkers of Am.* v. *Am. Mfg. Co.*, 363 U.S. 564, 565 (1960). Thus, the decision below does not merely threaten to impose a "boundless" arbitration obligation (as the dissenting opinion observed, Pet. App. 17a-18a). It also threatens to impose that obligation on a virtually limitless number of collective bargaining agreements.

The breadth of the decision's impact is confirmed by the experience of *amicus*'s members. Those members have countless collective bargaining agreements with clauses that are functionally indistinguishable from the recognition and arbitration provisions at issue in this case. For example, nearly all of one member's collective bargaining agreements—more than 50 agreements covering in excess of 75,000 workers—include substantively identical recognition and arbitration clauses. Other large providers, as well as medium and small providers serving both rural and urban areas, have similar clauses in their agreements. The effect of the court of appeals' decision thus is not limited to a narrow or even substantial category of cases. It upsets myriad collective bargaining agreements throughout the Nation.

B. The Decision Below Upsets Settled Presumptions Regarding Workplace Changes Not Addressed By Collective Bargaining

The impact of the decision below is exacerbated by its dramatic reversal of understandings that had previously prevailed in this area. Before the decision below, there was a relatively clear line between terms the employer could change unilaterally and those that it could not. The general rule was that, if an employer wishes to change a term of employment that "is not contained in the contract," it could do so "unilaterally" (following good-faith bargaining where mandatory). *UAW* v. *NLRB*, 765 F.2d 175, 179 (D.C. Cir. 1985); see *Inland Tugs* v. *NLRB*, 918 F.2d 1299, 1307-08 (7th Cir. 1990). And because the standard arbitration clause limits the right to arbitrate to matters involving interpretation of the agreement's terms or provisions, changes to matters not covered by the collective bargaining agreement were not subject to arbitration. As then-Judge Kennedy put it, policy dis-

putes not addressed by the terms of the collective bargaining agreement were left "to the collective bargaining process, negotiation, the economic strength of the parties, and such judicial action as may be available, at least until the policy is applied in particular cases." *Aluminum Co. of Am.* v. *UAW*, 630 F.2d 1340, 1344 (9th Cir. 1980) (footnote omitted).

That traditional framework offered predictability to both employees and employers. If the issue was covered by the agreement (or arguably covered), it was subject to arbitration. If the agreement did not address the issue, it was not arbitrable, and the parties had to settle it by bargaining (where mandatory) or, failing that, through the employer's unilateral decision as dictated by market forces. The court of appeals' decision in this case upends that stable framework: Invoking a recognition clause that is standard in all agreements, the decision makes virtually any putatively "significant" change in workplace policy arbitrable on the theory that an arbitrator could construe the recognition clause to *prohibit* any "significant" change absent union consent—even though the recognition clause does not say that. Pet. App. 6a. The court of appeals' holding thus substitutes arbitration for the market, handing over industrial policy on all matters not covered by the agreement from the company to the arbitrator.

Moreover, by rendering virtually all new workplace policies arbitrable, the court of appeals' decision threatens massive new costs and delays for both unions and employers. Those impacts should not be underestimated. For example, one of *amicus*'s larger members received, in a recent period under just one of its many contracts, more than 150 grievances over matters not addressed by the collective bargaining agreement—all claiming a viola-

tion of the recognition clause. The resulting flood of arbitration requests will impose substantial delays, exacerbating the existing backlog of labor arbitrations.[2] Legitimate arbitration requests for issues the parties *did* agree to arbitrate will be deluged beneath a torrent of requests pressing the limits of the ill-defined boundary between "significant" changes for which union consent is putatively mandatory and "insignificant" changes for which it is not. Cf. *Boeing Co.* v. *UAW*, 349 F.2d 412, 413 (3d Cir. 1965) (denying motion to compel arbitration of company's decision to stop distributing "Christmas turkeys" to employees because "the company was bound only to arbitrate grievances which involved 'the interpretation or application of provisions of this agreement'"). The resulting costs could be significant as well. As one union publication explains, "arbitration is expensive. Professional arbitrators cost $1000 a day, and court reporters $700 a day; even more expensive is the cost of outside attorneys." Don McIntosh, *Transit Union TriMet Contract Comes to Grief*, Northwest Labor Press, July 21, 2006, *available at* http://www.nwlaborpress.org/2006/7-21-06ATU.html.

Of course, parties have always been free to agree contractually to arbitrate all workplace disputes and thereby incur the resulting delays and costs. That parties have customarily limited arbitration only to terms contained in the collective bargaining agreement says much about the future economic impact of the court of appeals' ruling. Those adverse consequences—and the potential for

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[2] When seeking rehearing before the court of appeals, petitioner noted that there are well over *200* arbitrations currently pending between it and the union that is respondent in this case. C.A. Pet. for Reh'g En Banc at 14 (filed July 16, 2007).

greater strife created by uncertainty—underscore the need for immediate review in this Court.

II. The Decision Below Cannot Be Reconciled With This Court's Decisions Or Fundamental Principles of Contract Interpretation

A. The Seventh Circuit's Decision Conflicts with *NLRB* v. *Borg-Warner Corp.*, 356 U.S. 342 (1958)

In *NLRB* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958), this Court squarely confronted the meaning and scope of the standard recognition clause. Specifically addressing the duties imposed by that clause, the Court held that it does *not* concern "wages, hours, and other *terms and conditions of employment.*" *Id.* at 349 (emphasis added). The panel majority in this case reached the opposite result with scarcely a nod in *Borg-Warner*'s direction. An arbitrator could read the recognition clause, the majority held, "to prohibit the Company from making significant changes in *the terms and conditions of employment* without the consent of the Union." Pet. App. 6a (emphasis added). Nowhere does the decision below explain how an arbitrator could conceivably read a clause that, under *Borg-Warner*, does not concern "wages, hours, and other terms and conditions of employment" to "prohibit * * * significant changes in the terms and conditions of employment."

Borg-Warner arose in the context of an unfair labor practice complaint following the breakdown of negotiations between the company and its recently certified union. As a condition of reaching an agreement, the company had demanded that the agreement include a recognition clause that recognized only the local affiliate of the certified union and not the international union the NLRB had certified. The union filed an unfair labor

practice complaint alleging that the company's demand constituted an effective refusal to bargain over mandatory subjects of bargaining, in violation of 29 U.S.C. §§ 158(a)(5) and 159(a).

Borg-Warner, the NLRB, and the Court all agreed that the case in part turned on whether the terms of the recognition clause could be considered a mandatory subject of bargaining. 356 U.S. at 349; see Br. of Wooster Div. of Borg-Warner at 31 ("[t]he question * * * is whether * * * 'the proposals are obligatory subjects of collective bargaining'"); Br. of NLRB at 3 ("The question presented * * * is whether * * * the recognition clause * * * was outside the statutory bargaining area."). If so, then there was no barrier to the company's insistence on certain terms in the recognition clause as a condition to reaching agreement on other mandatory bargaining subjects. *Borg-Warner*, 356 U.S. at 349. The Court concluded, however, that the recognition clause did "not come within the definition of mandatory bargaining" under the relevant statutes. *Id.* at 350. Mandatory bargaining, the Court explained, extended to issues such as "wages, hours, and other terms and conditions of employment." *Id.* at 349 (citing 29 U.S.C. § 158(d)). The recognition clause, by contrast, bears upon *whom* the employer recognizes as its bargaining partner. *Ibid.*; see also *Local Lodge No. 1424, Int'l Ass'n of Machinists* v. *NLRB*, 362 U.S. 411, 412 (1960). It simply has nothing to do with "wages, hours, and other terms and conditions of employment." *Borg-Warner*, 356 U.S. at 349-350.

Borg-Warner cannot be squared with the court of appeals' decision here. A clause that has nothing to do with the "terms and conditions of employment," 356 U.S. at 349, cannot be read to give the union a veto over changes to the "terms and conditions of employment,"

Pet. App. 6a. *Borg-Warner*, moreover, illustrates the purpose of a recognition clause—to recognize the union that will represent the relevant bargaining unit. Indeed, the dispute in *Borg-Warner* arose because the company tried to recognize the wrong union in its proposed recognition clause. This Court therefore construed the recognition clause to do just what its name implies—to recognize a union. That clause does not *sub silentio* smuggle in additional substantive rights regarding the terms of employment that are not included elsewhere in the collective bargaining agreement.[3] The impossibility of reconciling the decision below with *Borg-Warner* weighs strongly in favor of further review.

B. The Court of Appeals' Decision Disregards the Ordinary Canons of Construction

The panel majority's disregard of *Borg-Warner* is exacerbated by its refusal to follow ordinary principles of contract construction.

1. The standard recognition clause at issue here provides that "[t]he Company recognizes the Union as the exclusive bargaining agent for [the] employees of the Company." Despite that seemingly straightforward language, the panel majority ruled that "an arbitrator could

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[3] Indeed, unions themselves acknowledge the nature of a standard recognition clause. See Transport Workers Union of America, *What's in a Contract?*, http://www.twu.org/departments/educ_rsrch/stewards/help_31.html (describing recognition clause as giving "the TWU sole jurisdiction over the classifications and type of work covered in the agreement"); International Brotherhood of Boilermakers, *Educate Your Members Regarding Their Contract*, http://www.boilermakers.org/resources/stewards_sourcebook/contract_education ("The union recognition clause gives your local jurisdiction over the classifications and type of work covered in the agreement.").

interpret the * * * clause to prohibit the Company from making significant changes in the terms and conditions of employment without the consent of the Union." Pet. App. 6a; see also *ibid.* ("The recognition clause is susceptible to any number of interpretations that may impose duties of notice and negotiation upon the Company."). That naked assertion, bereft of supporting analysis, cannot be reconciled with the longstanding rule that agreements (like statutes) must be interpreted according to their plain meaning. *Norfolk S. Ry. Co.* v. *Kirby*, 543 U.S. 14, 32 (2004). As the dissent below explained, the majority's "interpretation is impossible." Pet. App. 14a. To reach it, one must "completely rewrite the recognition clause, engrafting a duty that is not there." *Ibid.* Surely if the parties meant to create such a union "veto" over any "significant change" in the conditions of employment, see *id.* at 15a, the collective bargaining agreement would say so expressly.

The court of appeals' construction, moreover, violates the bedrock principle that a court should not interpret a contract in such a way as to "render[] a portion of [it] superfluous." 11 Williston on Contracts § 32:5, at 427 (4th ed. 1999); see *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Div.*, 358 U.S. 103, 115 n.10 (1958). The standard arbitration clause at issue here specifies that the right to arbitration extends "*only*" to matters involving employee discipline or "[t]he interpretation or application of any of the terms or provisions" of the agreement. Pet. 3 (emphasis added). Yet the panel majority's interpretation would make virtually *any* dispute of arguable significance arbitrable, including those nowhere addressed in the agreement. The union would merely have to urge that the change is "significant" and that, as a result, the recognition clause forecloses the

change absent union consent. That remarkable construction renders the requirement that the matter involve "interpretation or application" of the terms of the agreement virtually meaningless. As one court has explained, it "is untenable to assert that by [agreeing to the recognition clause, the employer] agreed to arbitrate every dispute arising out of its failure to accord the union a joint role in the corporate decisionmaking process." *UAW* v. *Acme Precision Prods., Inc.*, 521 F. Supp. 1358, 1362 (E.D. Mich. 1981); cf. *Alcoa*, 630 F.2d at 1344 (rejecting reliance on broad "fairness" clause to compel arbitration in the face of a limited arbitration clause, because "nearly any employer practice which an employee thought was unfair seemingly could be taken to arbitration on the theory that the employer impliedly promised not to take unfair actions").

The majority opinion also violates the rule that, absent evidence of a "contrary intention," parties "to a contract * * * are presumed or deemed to have contracted with reference to existing principles of law." 11 Williston, *supra*, § 30:19, at 203–04; see also *id.* at 206–11. As explained above (pp. 11-12, *supra*) and in Judge Sykes' dissent (Pet. App. 14a-15a), the claim that the recognition clause might prohibit petitioner from changing any significant policy without union consent contravenes the ordinary labor-law rule that employers have a right "to unilaterally implement new employment conditions *not* contained in the agreement after bargaining in good faith." It is simply impossible to read the boilerplate language of the recognition clause not merely to abandon but to reverse that background legal presumption.

2. The court of appeals apparently thought a general policy of "striv[ing] to avoid absurd results," Pet. App. 5a, made it appropriate to distort the otherwise unambig-

uous recognition clause. Relying at length on the collective bargaining agreement's "no-strike provision," see *id.* at 7a-9a, the panel urged that the collective bargaining agreement's prohibition on strikes made it plausible to read the recognition clause to bar any significant workplace changes absent union consent because "a refusal of the company to arbitrate would otherwise leave the union without options." *Id.* at 8a. "Without the ability to strike or compel arbitration," the majority claimed, "the Union has no recourse." *Id.* at 10a. The claim that construing the agreement according to its terms would leave the union without "recourse" is incorrect. As the Ninth Circuit explained in *Alcoa*, and Judge Sykes observed below, the union has "remedies [under] the collective bargaining process" when the agreement comes up for renegotiation, and a potential opportunity for good-faith bargaining under the NLRA. Pet. App. 15a; 630 F.2d at 1344.[4]

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[4] Indeed, in this case, "the record reflects that [petitioner] gave notice of the new policy and offered to meet with Union representatives to bargain over it," and made several modifications to the policy in response to union requests. Pet. App. 13a (Sykes, J., dissenting). While the majority stated in passing that "[t]he Union has alleged that the Company did not bargain in good faith," Pet. App. 10a-11a, Judge Sykes correctly observed that the union made no such allegation in its complaint or petition to compel arbitration. See *id.* at 13a-14a (Sykes, J., dissenting). The district court's opinion does not even mention the parties' bargaining history, much less any allegation that petitioner failed to bargain in good faith. See *id.* at 19a-23a. In any event, petitioner's good faith has no bearing on the legal issue in this case, which is whether the union may compel arbitration based on the theory that the recognition clause can be read to preclude *any* significant change—even on issues not addressed in the collective bargaining agreement—absent union consent.

More fundamentally, the fact that the agreement limits or omits particular remedies for certain changes—excluding those changes from arbitration and foreclosing a strike—does not license courts to insert an arbitration remedy that does not otherwise exist. If the union did not successfully bargain for certain remedies (perhaps giving them up for others thought more important), the courts must respect that result. Adhering to that principle, the Ninth Circuit's decision in *Alcoa* rejected precisely the argument the panel majority accepted here. Refusing to expand the scope of an arbitration clause, then-Judge Kennedy explained that "a party may not always seek to have resolved through arbitration those matters which it was not successful in resolving through bargaining." 630 F.2d at 1344. Instead, where the collective bargaining agreement does not address the issue (and the matter therefore falls outside the scope of the arbitration clause), the agreement must be read as "leav[ing] resolution of these issues to the collective bargaining process, negotiation," or management decision in light of "the economic strength of the parties * * * at least until the policy is applied in particular cases." *Ibid.* The decision below thus does not merely depart from standard principles of construction. It also departs from the Ninth Circuit's decision in *Alcoa*.

3. The court of appeals' decision, moreover, destroys the coherence and balance of the collective bargaining agreement's arbitration provision. That provision establishes a right to arbitrate two categories of matters. First, issues involving interpretation of a contractual term can be raised immediately in arbitration. Second, the discipline of any employee with more than six months of service (in essence, all non-probationary employees) is arbitrable. Under that second provision, even issues not

addressed in the agreement—such as the work performance standards here—can be raised if they result in employee discipline. Thus, contrary to the decision below, the question is not *whether* a dispute over the performance guidelines is arbitrable, but *when* and *how*. As *Alcoa* observed, the fact that a particular matter is not addressed by the bargaining agreement, and thus is not immediately arbitrable, does not leave the union without remedies. Instead, it merely excludes arbitration at least "until the policy is applied in particular cases." 630 F.2d at 1344.

That is a common and sensible approach in collective bargaining agreements. In the related context of judicial review of agency decisionmaking, Congress often establishes statutory schemes that delay review by foreclosing abstract challenges to new rules, instead requiring that all challenges arise in the context of a specific application of the rule to the detriment of a particular individual. See, *e.g.*, *Shalala* v. *Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 19 (2000) (Medicare); *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 207-09 (1994) (mine safety); *Heckler* v. *Ringer*, 466 U.S. 602, 619 (1984) (Social Security).

This Court and others have repeatedly recognized the benefits of that approach. It aids dispute resolution by ensuring that the controversy arises in a concrete factual setting rather than in the abstract. Cf. *Lujan* v. *Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990) ("[A] regulation is not ordinarily considered * * * 'ripe' for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him."). It promotes efficiency by preventing premature adjudication of

policies that may never be applied. Cf. *Beach Commc'ns, Inc.* v. *FCC*, 959 F.2d 975, 984 n.14 (D.C. Cir. 1992) (noting "the agency's interest in crystallizing its policy before that policy is subjected to judicial review and the court's interests in avoiding unnecessary adjudication and in deciding issues in a concrete setting"). And it allows the employer to see how a new policy works in practice and, perhaps, to adjust the policy voluntarily in light of actual experience. Cf. *Ill. Council*, 529 U.S. at 13 (requiring individualized agency action "assures the agency greater opportunity to apply, interpret, or revise policies, regulations, or statutes without possibly premature interference by different individual courts").

The bargaining agreement in this case was designed to replicate those advantages. New policies could be arbitrated in the abstract only where, because they involve interpretation of the collective bargaining agreement, the text of the agreement itself provides a sufficient framework to guide the arbitrator. By contrast, disputes about matters not addressed in the collective bargaining agreement—abstract issues where the agreement itself would provide the arbitrator no guidance—were not immediately arbitrable. Instead, such matters could be arbitrated only in the context of actual employee discipline that would provide a record for review, a concrete, factual setting defining the contours of the controversy, and an opportunity for the employer to modify or mitigate its policy in view of its actual operation. By reading the arbitration provision to make all disputes arbitrable in the abstract if they involve any "significant" change in policy, the majority opinion wreaks havoc with the agreement's careful structure. It allows the union to do precisely what the agreement seeks to foreclose—bring an abstract, pre-discipline arbitral challenge to a

workplace policy addressed nowhere in the collective bargaining agreement.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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